Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer Information	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, As Amended	)	

REPLY COMMENTS OF QWEST SERVICES CORPORATION

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TABLE OF CONTENTS

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	)	
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Pursuant to the Federal Communications Commission's ("Commission" or "FCC") request for comment with respect to its *Second Further Notice of Proposed Rulemaking* ("*Second Further Notice*")[2] in the above-captioned proceedings, Qwest Services Corporation ("Qwest") respectfully submits these Reply Comments.

I. INTRODUCTION AND SUMMARY

As Qwest demonstrated in its opening Comments, the Tenth Circuit's action in *U S WEST v. FCC*[3] significantly limits the Commission's discretion in promulgating Customer

[1] The *Second Further Notice* states that parties should make filings in this proceeding in CC Docket 99-273 (*see Second Further Notice* ¶ 32), despite the fact that the caption of the proceeding does not reference such docket. Qwest assumes this is simply a typographical error.

[2] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket Nos. 96-115 and 96-149, *Second Further Notice of Proposed Rulemaking*, FCC 01-247, rel. Sep. 7, 2001.

[3] *U S WEST, Inc. v. FCC*, 182 F.3d 1224, 1240 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 2215 (June 5, 2000) (*"U S WEST v. FCC")*.

Proprietary Network Information ("CPNI") approval processes and imposes material constitutional restraints on the Commission's revisitation of its *CPNI Order*.[4] When tested against those constraints, only a governmentally-mandated opt-out CPNI approval process can be sustained. Such process is also the most consistent with the deregulatory goals of the Act and Commission policy.

The overwhelming majority of commenting parties agree with Qwest's position. Those commentors argue, correctly, that carriers should have primary responsibility for establishing and implementing CPNI approval processes,[5] guided by market forces,[6] with government enforcement mechanisms available as an additional safeguard.[7] Alternatively, if the Commission is nevertheless inclined to adopt specific regulations governing CPNI approvals, commentors argue that only an opt-out CPNI approval process accommodates constitutional considerations, customer privacy interests and legitimate commerce.[8] The Commission should align its

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[4] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 8061 (1998) ("*CPNI Order*").

[5] ALLTEL Communications, Inc. ("ALLTEL") at 2; Cingular Wireless LLC ("Cingular") at 2-3; Cellular Telecommunications & Internet Association ("CTIA") at 5-6; Sprint Corporation ("Sprint") at 2, 4-5, 6-7 all noted that no formal Commission rules are required with respect to the CPNI approval process. CTIA noted that the Commission could simulate the self-regulatory privacy approach adopted by the Federal Trade Commission ("FTC"), an approach extolled by the current Chairman of the Commission. CTIA at 6-10. *And see* Qwest at 18-19 n.62.

[6] AT&T Wireless Services Inc. ("AWS") at 2; Cingular at 2-3; United States Telecom Association ("USTA") at 13.

[7] Sprint at 6; CTIA at 12; USTA at 13. Individuals can complain to the Commission either informally or formally or the Commission can proceed against a carrier for engaging in an unreasonable practice. 47 U.S.C. §§ 208, 209; 47 C.F.R. §§ 1.716, *et seq*., 1.720, *et seq*.

[8] *See* ALLTEL at 4; AT&T Corp. ("AT&T") at 3-9; AWS at 2, 6, 8-9, 10; BellSouth Corporation ("BellSouth") at 4-5; CenturyTel, Inc. ("CenturyTel") at 3-4, 8-10; Direct Marketing Association ("DMA") at 3; Nextel Communications, Inc. ("Nextel") at 2; National Telephone Cooperative Association ("NTCA") at 2, 4; SBC Communications Inc. ("SBC") at 2, 8-13; Sprint at 6-7;

regulatory action with this advocacy, since it is the only course of action calculated to be sustained as constitutionally permissible.

Only two commentors -- the Electronic Privacy Information Center, *et al.*, ("EPIC") and Mpower Communications Corp. ("Mpower") -- argue for an opt-in approval requirement for all (EPIC) or some (Mpower) CPNI. Neither supports its position with relevant legal precedent or empirical evidence. Rather, each purports to support its argument with conjecture and analogies to inappropriate facts or situations. These comments fail to provide the evidentiary support necessary to justify an opt-in CPNI approval mechanism under the requirements of *Central Hudson*[9] and the Tenth Circuit's analysis.

EPIC, somewhat reconstituted from the *Amici Curiae* group of parties that filed an unsuccessful petition for reconsideration before the Tenth Circuit,[10] presses arguments similar to those raised earlier and rejected by that Court. Accordingly, any decision that relies upon these unsubstantiated arguments will be rejected -- again -- on appeal.

EPIC here tries to revive its case that an opt-out CPNI approval requirement fails to protect some general government interest in privacy. EPIC fails to supply any of the evidence or

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Vartec Telecom, Inc. ("Vartec") at 2; Verizon Telephone Companies ("Verizon") at 2-3; Verizon Wireless at 1, 4-5, 12-15; USTA at 3; WorldCom, Inc. ("WorldCom") at 1-2.

[9] *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) ("*Central Hudson*"). As outlined by the Tenth Circuit, "the government may restrict the speech only if it proves: '(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest.'" *U S WEST v. FCC*, 182 F.3d at 1233 (referencing *Central Hudson*, 447 U.S. at 564-65).

[10] In this filing, EPIC professes to represent "15 consumer and privacy organizations." EPIC at 6. Significantly, this commenting body no longer enjoys the support of the "22 Law Professors and Privacy Scholars" who were represented by its predecessor's filing. *See* Motion of the Electronic Privacy Information Center, *et al.*, filed Oct. 22, 1999, Case No. 98-9518 (10th Cir.) and Brief of the Electronic Privacy Information Center, *et al.*, filed Oct. 22, 1999 in the same case.

analysis that was missing from its predecessor's prior claims, and from the Commission's original *CPNI Order*. Specifically, EPIC fails to explain the specific nature and importance of the governmental interest in protecting consumer privacy with respect to CPNI. EPIC fails to provide any relevant facts or data to show how an opt-out CPNI approval mechanism would compromise any legitimate governmental interest associated with a carrier-customer relationship or the interests of the parties to the telecommunications service relationship. Indeed, EPIC provides only the most superficial legal analysis on the subject of informational privacy, citing to cases where the facts and the law are inapposite to the current situation. All told, EPIC's advocacy that the Commission re-impose an opt-in CPNI approval mechanism as a matter of federal mandate essentially invites the Commission to abrogate the law and constitutional protections afforded speakers and audiences under the First Amendment. The Commission should decline the invitation.

So too must the Commission decline the invitation of Mpower to parse CPNI into different information sub-elements and require opt-in approval before CPNI **usage** information can be used by a carrier, shared with an affiliate, or disclosed to a third party. Mpower's purported "proof" is deficient to sustain its advocacy, based as it is solely on its opinion and a misplaced comparison between information practices, policies and protections between the United States and the European Union. Mpower provides no empirical evidence that customer expectations generally would require such differentiation and offers no legal analysis regarding how such a bifurcated approach to a CPNI approval process would pass constitutional scrutiny.

Finally, four commentors urge the Commission to deviate from its repeated finding that Section 222 -- not Section 272 -- controls the use and sharing of CPNI by a BOC and its Section 272 Affiliate. Those commentors disagree with the Commission's findings for reasons that have

nothing to do with the Tenth Circuit's disapproval of the mandatory opt-in process. Those commentors argue, variously, that the Commission's current position is wrong and has been wrong since its adoption; that affirmative consent to share CPNI with a Section 272 Affiliate must be secured by a Bell Operating Company ("BOC") before that sharing takes place; or that nonaffiliated carriers should be added beneficiaries of any notice and opt-out approvals secured by a BOC for CPNI usage within its corporate enterprise. That is, they argue that if BOCs use opt-out approval mechanisms to support CPNI sharing with their Section 272 Affiliates, the BOCS should be required to provide "notice" that other carriers may access the BOC's customers' CPNI unless the BOC's customers "opt-out" of such third-party disclosures. As AT&T puts it, its an all or nothing approach for the consumer.[11]

The arguments of these parties have nothing do with the protection of customer privacy or the public interest, and cannot justify interference with protected speech. In this regard, apart from the fact that the commentors have failed to articulate any basis for the Commission to change its position on the interplay between Sections 222 and 272, none of them address the lawfulness under the First Amendment of a requirement that conditions a BOC's right to speak to its affiliate on its provision of CPNI to others. The Tenth Circuit's clear determination that intra-corporate speech -- including speech by local exchange companies with wireless and long distance affiliates -- is constitutionally protected speech,[12] and the Commission's obligations to

[11] AT&T at 15 n.10.

[12] *U S WEST v. FCC*, 182 F.3d at 1230 (observing that the Commission's "regulations treat affiliated entities of a carrier as separate for the purposes of use or disclosure. Thus, the regulations permit unapproved disclosure of CPNI between affiliated entities of a telecommunications carrier only when the carrier provides different categories of service and the customer subscribes to more than one category of service;" in this discussion the Court references both wireless and long distance services); 1233 n.4 (where the Court stated that "the [intra-carrier] speech is properly categorized as commercial speech").

construe statutes in a manner that avoids constitutional conflicts,[13] underscores the absence of any basis for the Commission to reverse its prior rulings on the interplay of Sections 222 and 272.

II. OPT-IN CPNI APPROVAL PROCESSES WILL NOT WITHSTAND CONSTITUTIONAL SCRUTINY AND SHOULD NO LONGER BE PURSUED

A. EPIC Fails To Offer Any Serious Legal Or Empirical Evidence To Support An Opt-In Process

EPIC's advocacy fails because it ignores the directive of the Tenth Circuit that "the government cannot satisfy the second prong of the *Central Hudson* test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served. Moreover, privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered proper balancing of the benefits and harms of privacy."[14] Contrary to the Court's clear directive, EPIC fails to identify any specific privacy harm associated with the use of CPNI within the carrier-customer relationship, or even within the context of reasonable third-party releases. And, EPIC makes no attempt to balance any "privacy harms" against the burden imposed on speakers and interested audiences, not to mention legitimate commercial activity (*e.g.*, efficiency, productivity, financial stability).[15]

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[13] *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). *See also In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, First Report and Order and Further Notice of Proposed Rulemaking,* 12 FCC Rcd. 5361, 5376 ¶ 37 (1997); *Second Report and Order*, 12 FCC Rcd. 3824, 3834 ¶ 24 (1997) (both *Orders* citing to *United States v. X-Citement Video, Inc.*, 115 S.Ct. 464, 467, 469 (1994)(513 U.S. 64, 68-69, 72-74)).

[14] *U S WEST v. FCC,* 182 F.3d at 1234-35 (footnote omitted).

[15] *Compare id.* at n. 7 ("privacy interferes with the collection, organization, and storage of information which can assist businesses in making rapid, informed decisions and efficiently

1. EPIC's Legal Citations are not Relevant or Controlling

EPIC attempts to fashion its putative government interest as one imbued with constitutional significance,[16] despite the Tenth Circuit's conclusion that the matter of CPNI use and sharing does not itself implicate a federal constitutional right to privacy since there is no claim that the government is violating any person's privacy.[17] At this time in American jurisprudence, there is no constitutional right to "informational privacy" as between private parties. There may be statutory rights, or common law rights, but there is no constitutional government obligation (or right) to protect private parties within a relationship from each other or to regulate the way in which information generated within that relationship is used.

The cases EPIC cites fail to support its position. Specifically, the cases do not involve parties within relationships using information within that relationship to advance the informational and pecuniary interests of both parties. Rather, some cited cases involve holders of information who are met with demands from unaffiliated entities to release the information when the holder of the information has no interest in doing so, *e.g., Lanphere & Urbaniak v. Colorado*[18] and *Department of Defense v. Federal Relations Auth.*[19] These cases do not address

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marketing their products or services. In this sense, privacy may lead to reduced productivity and higher prices for those products or services").

[16] EPIC at 3 ("The constitutional right of privacy protects two distinct interests: 'one is the individual interest in avoiding disclosure of personal matters, and the other is the interest in independence in making certain kinds of important decisions,'" referencing *Whalen v. Roe*, 429 U.S. 589 (1997)).

[17] *U S WEST v. FCC*, 182 F.3d at 1234 n.6 ("Here, the question is solely whether privacy can constitute a substantial state interest under *Central Hudson*, not whether the FCC regulations impinge upon an individual's right to privacy under the Constitution."). *Compare Whalen v. Roe, see* note 16, *supra*, articulating the elements of a constitutional claim. *And compare Sheets v. Salt Lake County*, 45 F.3d 1383 (10th Cir. 1995) (cited by EPIC at 3 n.9), which also involved a claim against the state under 42 U.S.C. § 1983.

[18] 21 F.3d 1508 (10th Cir. 1994), cited in *U S WEST v. FCC*, *id.* at 1235 (supporting the Court's decision to assume a substantial government interest).

the rights of a willing carrier/speaker or an interested customer/audience or the matter of information generated within a relationship being used within that relationship. Failing even to address the facts of the instant case, these cases clearly do not support imposing a high barrier (*i.e.*, opt-in approval) to speech within the context of the existing relationship.

The case of *Edenfield v. Fane*,[20] while containing the language quoted favorably by EPIC,[21] resulted in judicial action at odds with EPIC's advocacy. In *Edenfield*, the Court invalidated a ban on in-person solicitation by certified public accountants, even though other communication vehicles (*e.g.*, mailings or advertisements) existed and remained permissible. The case supports more the position of Qwest and commentors supporting opt-out CPNI approval mechanisms than a party urging an opt-in model.

Likewise meritless is EPIC's attempt to bolster its position by citing a publication written by two academicians regarding informational privacy practices and policies in the United States as compared to the European Union.[22] The relevance of that work to the current CPNI approval debate is oblique at best.[23] While EPIC's reference might be instructive for policymakers within a legislative or diplomatic venue, the commentary bears little materiality on the question of the

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[19] 510 U.S. 487 (1994), cited by EPIC at 4 n.11. While the case does contain dicta about information and an individual's expectation of privacy, it was within a context of information being legally wrested from a holder not desiring to release it. That is certainly not the case here.

[20] 507 U.S. 761 (1993).

[21] EPIC at 3 n.9.

[22] *Id.* at 5 and n.23. *See* note 51, *infra* discussing the dubious relevance of the question "whether the United States has adequate privacy protection to support transborder data flows from the European Union" to this case. The referenced law review article was authored in that context.

[23] It is precisely because the subject of "privacy" can encompass so many different types of interests and considerations that the Tenth Circuit cautioned that governmental "interests" in privacy cannot be abstract or broad or ill-defined when the government claims to be protecting those interests. Rather, the interests -- and the harms anticipated if the interests are not protected -- must be specific and explicit. *See U S WEST v. FCC*, 182 F.3d at 1234-35.

lawfulness of a governmentally-mandated opt-in CPNI approval process. The latter question involves not an analysis of nations characterized by different information use philosophies and policies as between disparate world economies but the use of specific information by entities within an existing business relationship.

EPIC also argues that "Congress recognized the importance of a citizen's privacy interest by enacting other statutes preventing disclosure of precisely the same information [as CPNI] to the public at large."[24] This assertion is incorrect on at least three counts. First, the information associated with EPIC's cited legislative enactments does not involve information "precisely" like CPNI. While cable viewing records and video rental records might be similar in sensitivity to CPNI to some persons, other information -- such as credit (financial) and medical information -- is generally considered more sensitive than CPNI, as witnessed by representations of other administrative agencies and expert opinions.[25] Second, EPIC's citation to the Cable Act and Video Privacy Act as supportive of its position is misplaced. The Cable Act allows internal use of customer information for purposes of providing cable and cable-like services;[26] and the Video

[24] EPIC at 4.

[25] Numerous parties argue that CPNI does not rise to the level of "sensitive" information in the way that financial or health information does. *See, e.g.*, ALLTEL at 4-6; AWS at 4; Cingular at 4-6; DMA at 4-6; Nextel at 2, 6-8; Sprint at 6 and n.1; Vartec at 3. *And see* U.S. Department of Commerce, National Telecommunication and Information Administration, "Privacy and the NII: Safeguarding Telecommunications-Related Personal Information," (October, 1995), at 25 n.98; Letter from Gina Harrison, Director, Pacific Telesis, to William F. Caton, Acting Secretary, Federal Communications Commission, dated Jan. 24, 1997, transmitting a letter from Privacy & Legislative Associates, Alan Westin and Bob Belair, to A. Richard Metzger, Jr., Deputy Chief, Common Carrier Bureau, Federal Communications Commission, dated Jan. 23, 1997, at 2-8 ("Westin Jan., 1997 Letter").

[26] 47 U.S.C. § 551. *And see* BellSouth at 6-7; DMA at 3-4; Verizon at 3 (arguing that the Cable Act presents an appropriate opt-out model for the Commission to consider). *See also* U S WEST, Inc.'s Opening Comments, CC Docket No. 96-115, filed June 11, 1996 at 7-10 ("1996 U S WEST Comments") (presenting a "schematic of the salient provisions of the two Acts" (47 U.S.C. § 551 and § 222), indicating that an opt-out approach would be quite

Privacy Act allows use of viewing information internally within a business operation and release of "category" information externally if the vendor posts a notice and allows individuals to opt-out.[27] Finally, EPIC's observations about Congressional actions to constrain government's access to individually-identifiable information[28] says nothing about access and the use of such information generated within a relationship by one party to a relationship.[29]

Tellingly, the statutes referenced by EPIC have not been subject to constitutional challenge and represent -- at least on their face -- not unreasonable accommodations of First Amendment rights. Moreover, more recent legislative proposals and deliberations continue to support opt-out approval mechanisms as representing the appropriate balance between commercial productivity and efficiency and privacy.[30]

2. EPIC Provides no Facts of Privacy Invasion

EPIC cites to publications addressing Americans concerns about privacy in the context of on-line activities.[31] Such "evidence" of privacy angst, particularly in a wholly different context

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appropriate under Section 222 given the similar legislative structure and language of the provisions).

[27] 18 U.S.C. § 2710(b)(2)(D)(ii).

[28] EPIC at 4. *And see* Mpower at 4-5.

[29] *See* 18 U.S.C. § 2703(c), prohibiting certain service providers from releasing customer transactional data to the government without legal process, but putting no constraints on those service providers with respect to voluntary releases to other parties.

[30] As AWS points out, proposed legislative bills continue to reflect opt-out approval mechanisms. AWS at 4-5 n.13. This suggests that past Congressional enactments endorsing opt-out approval models were not aberrant or extraordinary. *And see* Verizon at 5-6 nn.8-9 and Verizon Wireless at 8-9 nn.21-22 (both referencing testimony before Congress in May, 2001, by privacy experts such as Alan Westin and Fred H. Cate, to the effect that individuals are often quite accepting of individually-identifiable information being used to promote customer convenience and commerce if there is an opportunity to opt-out).

[31] EPIC at 4 and n.13, 5 and n.24, referencing supporting documents that appear to involve only or primarily online activities or cyberspace. Their relevance to the instant case is not sufficient to support an affirmative CPNI approval process.

than that at issue here, is clearly not sufficient to sustain an opt-in CPNI approval mandate. As the Tenth Circuit stated, the government cannot satisfy the *Central Hudson* test "by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served."[32] For EPIC to provide the Commission with the requisite foundation to successfully defend an opt-in CPNI approval regime, it must correlate a specific privacy interest with a narrowly-tailored government protection. It fails to do so.

EPIC's attempt to prove that CPNI is seriously sensitive information that can support a substantial governmental interest[33] fails because it ignores several pertinent considerations. It fails to analyze how its position squares with the fact that Americans are not a monolithic block when it comes to matters of privacy and information use.[34] Furthermore, it ignores the fact that, although the Tenth Circuit acknowledged that some CPNI might be deemed sensitive,[35] it nevertheless expressed considerable skepticism about the strength of the government's interest.[36] Finally, EPIC's argument fails to address existing record evidence that shows that individuals do

[32] *U S WEST v. FCC*, 182 F.3d at 1235.

[33] EPIC at 4 n.12 and accompanying text (citing to a case involving the Fourth Amendment constitutional right to privacy, *Smith v. Maryland*, 442 U.S. 735, 748 (1979) (Stewart, J., dissenting)).

[34] *See* Westin Jan., 1997 Letter at n.2 ("Approximately 16 percent of the public are 'privacy unconcerned' and, for them, there is very little in the way of personal information which they deem to be 'sensitive.' Another approximately 24 percent of the public can be classified as 'privacy fundamentalists' and, for them, almost any personal information is deemed to be quite sensitive. The majority of the American public, approximately 60 percent, can be usefully categorized as 'privacy pragmatists.' For them, the sensitivity of personal information will vary . . . as will their tolerance for the disclosure and use of . . . information.").

[35] *U S WEST v. FCC*, 182 F.3d at 1229 ("sensitive nature of some CPNI, such as when, where, and to whom a customer places calls").

[36] *Id.* at 1234-35.

understand opt-out approval models, have used them,[37] and are irritated -- not pleasantly engaged -- by opt-in CPNI requirements.[38]

EPIC argues that an opt-out CPNI approval mechanism cannot protect customers' privacy in a CPNI context "because it is not calculated to reasonably inform consumers about their privacy options."[39] It continues that an opt-out process would put "the burden on the customer to pay for and return their opt out notice."[40] What EPIC continues to ignore is that an opt-in requirement burdens the First Amendment rights of speakers and interested listeners. If the concept of "informed consent," as articulated by EPIC, were sufficient to override constitutional considerations, the Commission's original *CPNI Order* would not have been vacated. If the Tenth Circuit's opinion means anything, it is that the burden of expressing a preference with respect to the use of CPNI be placed on individuals who may have a strong position on the matter, rather than on individuals who have no position or not a strong position adverse to such use.

In all events, EPIC's claims that an opt-out process cannot satisfy the "approval" requirement of Section 222 is entirely hypothetical and speculative. The Tenth Circuit, of course, has held that speculation cannot form the basis for a government regulation impinging on

[37] Qwest at 12-13 nn.45-46. *And see* Westin Survey at page 9 ("Analysis of the people who have used opt outs indicates that they are at the highest levels of privacy concern").

[38] CenturyTel at 6 (noting that in its experience customers become vexed when asked by the carrier if CPNI can be used for purposes of discussion about other services), 11-12. *Compare* Verizon at 4 and n.5 (citing to Supplemental Comments of Bell Atlantic, CC Docket No. 90-623 at Att. 2, filed May 5, 1994, attached to Reply Comments of Bell Atlantic, CC Docket No. 96-115, filed June 26, 1996).

[39] EPIC at 5.

[40] *Id.*

lawful speech.[41] EPIC makes no attempt to demonstrate how its advocacy would survive the judicial directive. Indeed, EPIC's claims are not merely unsupported, but are refuted by the fact that there is a range of approaches to the "opt-out" choice (*e.g.*, telephone calls, electronic messaging) that can satisfy the approval requirements,[42] particularly when that requirement is construed -- as it must be -- in a manner consistent with the Constitution.

Other of EPIC's listed infirmities with an opt-out CPNI approval process are similarly speculative and -- even if proven -- are clearly insubstantial from the perspective of governmental interests and privacy protection. Its concerns, for example, that notices may get lost under a pile of other less important mail (including other notices), may not be paid attention to by consumers or may be written in unintelligible language,[43] are rank speculation, at least with respect to CPNI and any future carrier notices. If EPIC or a consumer finds fault with a specific carrier notice, either can file a complaint with the Commission.[44] The fact that this less restrictive alternative is available defeats all of EPIC's "list of horribles" associated with an opt-out CPNI approval process.

Moreover, even if EPIC's observations were not entirely speculative, they would not support the arguments it advances. The government cannot depress the communication of lawful speech to potentially interested persons in order to protect uneducated, inattentive adults. The

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[41] *U S WEST v. FCC*, 182 F.3d at 1237. *And see* CenturyTel at 5 ("the *CPNI Order* is void of any empirical explanation or justification for the government's interest in protecting privacy"); Nextel at 4 ("The argument of opt-in advocates that a customer's failure to opt-out may not be construed as constituting informed consent is based on nothing more than speculation").

[42] *See Second Further Notice* at ¶ 9. *And see* Verizon Wireless at 5; Cingular at 6; AT&T at 6 n.4; *and see* CenturyTel at 11 (apparently intending to use just a reply card).

[43] EPIC at 5-6.

[44] 47 U.S.C. § 208 does not require specific injury or harm to an entity before a complaint can be filed. While a defense associated with "standing" may be lodged, the resolution of the matter is discretionary, not preemptive.

notion that government must intervene to protect customers whom it believes are incapable of responding to an opt-out notice sent to them by first-class mail reflects the kind of paternalistic attitude that the Supreme Court has repeatedly rejected as justification for restrictions on commercial speech.[45] The Constitution requires that the burden of overcoming inertia be placed on those who wish to restrict the dissemination of information, not on speakers or interested audiences.[46]

B. Mpower Fails To Make A Case For An Opt-In Requirement For CPNI Usage

Mpower presses an opt-in CPNI approval mechanism with respect to a certain sub-element of CPNI. Mpower argues -- based on its "belief"[47] -- that the Commission should differentiate between two kinds of CPNI, *i.e.*, CPNI dealing with facilities/feature information (*e.g.*, a particular customer has two lines and subscribes to Caller ID) and usage information (*e.g.*, a number called, date, time, length of call). For CPNI usage information, Mpower

[45] *See 44 Liquourmart v. Rhode Island*, 116 S.Ct. 1495, 1507 (1996) (principal opinion); *Edenfield v. Fane*, 507 U.S. at 767; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976). *See also* AT&T at 7 (noting that the Supreme Court has refused to find that consumers interested in a subject matter "would fail to protect themselves"); Nextel at 5 ("The arguments of opt-in advocates rest on the paternalistic and unsupported assumption that consumers are either too uninformed or too disengaged to act to control the use and disclosure of . . . CPNI.").

[46] *See U S WEST v. FCC*, 182 F.3d at 1239 (asserting that it is speculative to assume such individuals will not act). *And see* AT&T at 6 ("[a]s for those customers who decline to opt out, there is no reason to believe that they place a high value on keeping their CPNI private"); Nextel at 3 ("there is no evidence that a customer opposed to a carrier's use or disclosure of his or her CPNI outside the customer's existing . . . relationship with that carrier would not opt-out from such use and disclosure"). *See also* note 37 *supra.*

[47] Mpower "believes that there is a basic underlying issue regarding the definition of CPNI . . . [and] believes that whereas opt-out approval would be adequate for [Customer Facilities Information] CFI/CPNI . . . that opt-in customer approval is required before use of CPNI usage information/[Customer Usage Information] CUI in order to protect customer privacy rights." Mpower at 1-2, 10. In addition to its belief, Mpower, expressing its sensitivity to the Tenth Circuit's differentiation between "target" and "broadcast" speech, apparently would have the Commission abdicate that opinion in favor of the sympathies of the minority. *Id.* at 8. Of course, the Commission is in no position to do so.

proposes an opt-in approval requirement. For a number of reasons, the Commission should reject Mpower's advocacy.

Mpower fails to provide any empirical evidence to support its position that CPNI -- including usage information -- constitutes "vitally important personal information" or "highly protected and extremely invasive" information.[48] This is a fatal flaw in its advocacy, all the more so since individuals do not share a single "privacy position" with respect to individually-identifiable information,[49] and customers must appreciate that their serving carriers generate this kind of network information which often appears as call detail on their bills. Moreover, even if there were evidence that some customers believe that CPNI usage information is more sensitive than other CPNI information, no evidence has been presented to show that such concern can be addressed only through an opt-in regulatory regime.[50]

Mpower fails to show a substantial governmental interest to support its bifurcated CPNI approval proposal,[51] fails to show how an opt-in process would support the speculative

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[48] *Id.* at 4-5.

[49] *See* note 34, *supra*.

[50] Indeed, the experiences of CenturyTel suggest that this kind of information is discussed with customers by service representatives (carriers discuss "with the customer his or her calling patterns, such as the time of day the customer most frequently makes calls") and that customers are irritated when asked to "approve" of its use, since the information is already in the carrier's possession. CenturyTel at 6. *And see* note 38, *supra.*

[51] Mpower references the European Union and how that Union approaches the matter of informational privacy (Mpower at 5-6). This reference fails as compelling evidence on the issue of how CPNI information (usage or not) should be treated in the United States given the legal and regulatory differences toward the matter of information collection and informational privacy. As the Department of Commerce itself has noted, "While the United States and the European Union share the goal of enhancing privacy protection for their citizens, the United States takes a different approach to privacy from that taken by the European Union. The United States uses a sectoral approach that relies on a mix of legislation, regulation, and self regulation. The European Union, however, relies on comprehensive legislation that, for example, requires creation of government data protection agencies, registration of data bases with those agencies, and in some instances prior approval before personal data processing may begin. As a result of

governmental interest across a broad range of customer sensitivities, and -- most certainly -- fails to show how its proposal is narrowly-tailored. Narrow-tailoring requires that the Commission not impose an opt-in CPNI approval mandate with respect to CPNI usage information in the absence of its ability to meet the *Central Hudson* test. Qwest questions if that is possible, given that carriers might legitimately communicate CPNI usage information within a corporate family and to customers. For example, a carrier might craft a customized package for a customer based on his/her calling patterns.[52] The service would be based on lawful and truthful information and might well promote the customer's commercial interests. Since the Tenth Circuit already considered the use of CPNI usage data within the context of its analysis;[53] and in that context struck down the Commission's rules, Mpower presents no argument that the Commission could adopt in conformity with the Constitution.[54]

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these different privacy approaches, the Directive could have significantly hampered the ability of U.S. companies to engage in many trans-Atlantic transactions." www.export.gov/safeharbor. It is certainly not for this Commission to craft CPNI rules that seek to accommodate the globalization of commerce. That is for other administrative agencies, who have the matter well in hand. *See, e.g.*, www.export.gov/safeharbor for a complete discussion of the Safe Harbor information protection policy negotiated by the Department of Commerce with the European Union.

[52] A carrier might decide to craft the package utilizing the entire 11-digit dialing pattern call detail (1-NPA-NXX-xxxx). Indeed, this was the idea around the "Friends and Family" toll package promoted by then MCI. Or it might determine the package is more diplomatically fashioned as an "NPA" package or an "NPA/NXX" package. In all events, the call detail provides the raw data on which to craft the package and communicate its contents. And, significantly from a constitutional perspective, the determination regarding the extent of CPNI used with respect to the product offering is not a governmental one.

[53] *U S WEST v. FCC,* 182 F.3d at 1229.

[54] Mpower also argues that because of certain CPNI "abuses," the Commission should establish some type of lag between the time a customer leaves an incumbent local exchange carrier and the time a winback contact is made. Mpower at 9-10. The Commission should not adopt Mpower's position. From the content of its filing, it is obvious that state authorities are addressing the need for a lag period. A rule applying ubiquitously to all carriers is not in order and would deprive consumers of the benefit of winback communications. *CPNI Reconsideration Order,* 14 FCC Rcd. ¶¶ 69, 72.

C. Opt-In CPNI Approvals Cannot Be Mandated For Third-Party Disclosures Generally

Isolated comments in the filed submissions can be read to suggest that there is something especially pernicious about disclosure of CPNI to third parties,[55] and state or imply that an opt-in process is more justifiable for such disclosures. However, no commentor provides any analysis under *Central Hudson* or the Tenth Circuit's decision to support such a position. Given the absence of evidence to support a broad governmental prescription regarding CPNI releases to third parties, the Commission cannot demonstrate there is no more narrowly-tailored means to reasonably regulate such disclosures.

As Qwest explained in its opening Comments, an opt-in CPNI approval process cannot lawfully be mandated by the government across the board, with respect to all third parties and all types of disclosures.[56] The best practice is to allow the carriers themselves to determine the appropriate scope of CPNI disclosures to third parties, as disciplined by market forces.[57] Unless or until, through a private complaint or regulatory enforcement action, a carrier's actions are

[55] *See* Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") at 4 ("the distribution of CPNI to unauthorized third parties may cause distress to consumers, and prohibitions against such abuses are warranted" and referencing concerns about "review" of individually-identifiable information by "nonaffiliated entities"). It may be that OPASTCO does not mean to create such a suggestion and means "unauthorized" third parties who receive CPNI without permission from either the carrier or the customer (such as a hacker) and means the term "abuses" to reference similar inappropriate conduct. *And see* USTA at 12 (referencing a different statute, but noting that "The consumer's expectations in terms of having information shared or sold and being marketed to [sic] companies they had no previous relationship with has raised concerns in some quarters"), 13 (stating that Section 222 requires that "carriers not share consumer CPNI with third parties").

[56] Qwest at 14-16.

[57] AT&T at 7; Cingular at 2-3, 4; OPASTCO at 5. Market forces would include not only competitive alternatives, such that a customer could change providers if he/she disliked the CPNI usage policy or practices of a particular carrier (*see* AT&T at 7; OPASTCO at 5) or file complaints (Sprint at 6), but also self-regulatory conduct such as that described by CTIA at 12-15 and DMA at 5-6 (referencing DMA's long-standing policy and guidelines regarding marketing contacts).

determined to be unreasonable, carriers should not be presumed to act in a manner that compromises their customers' privacy expectations. This is especially true in light of the variety of reasonable CPNI releases that can be anticipated and the limited record evidence of individuals' aversion to such information releases.[58]

Some carriers urge the Commission to force carriers to release CPNI to unaffiliated entities pursuant to any opt-out approval process instituted by the carrier holding the CPNI at issue.[59] The Commission should reject this advocacy, since it has already struck a reasonable balance in its interconnection proceedings on the issue of third-party access to CPNI. Carriers are permitted access, through Operational Support Systems ("OSS"), to CPNI contained in customer service records ("CSR") for legitimate purposes (to initiate or render service, *i.e.*, "preorder" and "order" conduct).[60] So long as incumbent carriers do not demand unduly

[58] The record evidence of customer expectations associated with third-party releases has generally been confined to the release of information for marketing purposes. *See* Comments of Cincinnati Bell Telephone Company, CC Docket No. 96-115, filed June 11, 1996, Appendix A, Report by Aragon Consulting Group, Page 2, "Question: How concerned would you be if [CPNI] was provided to other companies -- not CBT -- in order for those companies to send you information regarding the products and services that they offer?", with the result that "almost half of the respondents surveyed (49.8%) indicate that they would be 'extremely concerned' (rating of 9 or 10 on a 10-point scale)." *And see* USTA at 12. However, to the extent carriers release information in different contexts, or where the third party is affiliated with the carrier such that there is a form of "joint marketing," the record evidence fails to support any need to establish the kind of high barrier to communication that an opt-in mandate imposes.

[59] While WorldCom makes this argument with respect to both incumbent local exchange carriers and BOCs (WorldCom at 7-11), AT&T and Nextel confine their advocacy to situations where a BOC might seek -- through an opt-out approval mechanism -- to share CPNI with a Section 272 Affiliate (AT&T at 15-16; Nextel at 9-13).

[60] Qwest at 14-15 and n.51. *And see CPNI Order*, 13 FCC Rcd. at 8178 ¶ 166. *Compare* Mpower at 8 (arguing that CPNI should be available to competitive local exchange carriers, but that usage information should be available only pursuant to affirmative opt-in consent).

Qwest agrees with WorldCom that the Commission's current interpretation of Section 222(d)(1), to grant exemptions from the CPNI rules only for the holder of the CPNI, is too narrow a construction of the plain language. *See* WorldCom at 9 n. 19. That subsection is better read to

burdensome customer approval requirements from new entrants (the most often complained of approval requirement is that the consent be in writing), and incumbent carriers permit access to the information when a customer has "approved" (whether orally, electronically, or in writing) such access, new entrants have little to complain about. The process allows for access to necessary information in those contexts where an individual has acknowledged the need for the information to be provided (*i.e.,* desires information from the provider or wants the provider as his/her carrier). There is nothing about this *Second Further Notice* proceeding that requires the existing regulatory framework be changed or modified.

III. THE COMMISSION IS NOT FREE, AS ADVOCATED BY SOME, TO CHANGE COURSE WITH RESPECT TO THE INTERPLAY BETWEEN SECTIONS 272 AND 222. A CHANGE IN POSITION WOULD BE ONE OF CONSTITUTIONAL SIGNIFICANCE

A few commenting parties, specifically the Association of Communications Enterprises ("ASCENT"), AT&T, Nextel and WorldCom, take the position that the communication of CPNI between a BOC and a Section 272 Affiliate should be burdened beyond the approval processes already inherent in Section 222.[61] These parties argue that Section 272 imposes an additional regulatory gloss on the BOC/Section 272 Affiliate relationship.

ASCENT, AT&T and WorldCom argue that there really would be no burden at all imposed by determining that Section 272 applies to CPNI sharing between a BOC and its Section 272 Affiliate in an opt-out context, since a BOC need simply include a statement in its notice and opt-out communication that it will share CPNI with its affiliates and any/all carriers

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permit -- but not compel -- carriers to use or disclose CPNI in the context of (d)(1) activities, even if those activities are "other service provider" activities.

[61] Mpower addresses the matter obliquely as one involving the state of competition in the industry, quoting at some length from the minority opinion in *U S WEST v. FCC*, 182 F.3d at 1245. Mpower at 7-8. Mpower's arguments have not only been addressed adversely to wit by

that ask for it, if the individual does not contact the BOC to object.[62] As AT&T so bluntly puts it, "In soliciting approval, the BOC would have to present the customer with an all-or-nothing choice: Either the customer opts-out of CPNI transfers to other carriers and section 272 Affiliates, or he does not opt-out at all."[63] So much for customer convenience or the public interest.

Nextel has a slightly different approach to the matter. It asserts that "[a]llowing BOCs to share CPNI with their affiliates through an opt-out mechanism to market new services, while requiring that the customer submit an affirmative **written** request before such information may be disclosed to the BOCs' competitors . . . would enable BOCs to use . . . CPNI" in a manner providing the affiliate with an unfair competitive advantage.[64] Nextel simply rehashes the

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the majority opinion in *U S WEST v. FCC*, but by earlier Commission declarations. *See* Qwest at 10-11 and n.38. Thus, its arguments lack any persuasive authority.

[62] ASCENT at 5 ("Under an opt-out approach, Section 272, as well as Section 222, could be satisfied through transmission of a single notice to customers which provided them with the option of blocking disclosure of their CPNI to both BOC affiliates and unaffiliated competitors"); AT&T at 15 ("all the BOC would have to do in order to comply with section 272 is obtain from the customer a blanket approval covering third parties as well as section 272 affiliates. . . A BOC could satisfy the requirements of section 222 and section 272 simply by sending a single notice to the customers informing them of their opt-out rights."); WorldCom at 11 ("If a BOC intends to seek consent for access by its affiliate under the opt-out approach, the BOC notification should also disclose that it will make access to such information available to unaffiliated entities on the same terms").

[63] AT&T at 15 n.10. *Compare* WorldCom at 11 ("If the BOC does not intend to disclose the information to the affiliate . . . it would not be required to provide [a] notification on behalf of, or disclose the information to, unaffiliated entities").

[64] Nextel at 2-3 (emphasis added), 13. It is not true, of course, that BOCs only share CPNI with other carriers when there is written consent from the customer. *See* Qwest at 15 and n.51.

It is not clear what the scope of the Nextel argument really is. While couched, most often, within the context of BOCs' sharing with Section 272 affiliates, at one point Nextel is arguing against BOC sharing with a wireless affiliate (*see* Nextel at 12, "a BOC could share a customer's CNPI . . . to market its CMRS services") -- something not impacted by the interplay between Sections 272 and 222.

"competition" argument which the Tenth Circuit has already dismissed.[65] As the Court made clear, intra-corporate speech, including speech between a carrier and its wireless and long distance affiliates[66] is protected by the First Amendment -- whether a carrier is a BOC or not. And, given Congress' express grant of joint marketing authority with respect to wireless and long distance services,[67] it is impossible to argue that, in passing the Telecommunications Act of 1996, Congress intentionally acted in a manner that would depress truthful communications about a carrier's services, even if a carrier offered more than one type of telecommunications service.

The Commission is not free to adopt the advocacy of the parties. It cannot fashion a CPNI approval process that permits BOCs only to share CPNI with a Section 272 Affiliate if they treat other carriers as if there were an affiliation where there is none. Such approach would, at a minimum, potentially compromise their customers' expectations. Nor can the Commission mandate that a BOC treat its own affiliate as if there were no affiliation with respect to CPNI sharing. The Commission has acknowledged that according Section 272(c)(1) any statutory prominence with respect to CPNI matters would put a BOC in an untenable position.[68] It would also be an unconstitutional one.[69]

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[65] *U S WEST v. FCC*, 182 F.3d at 1236-37.

[66] *See* note 12, *supra.*

[67] *See* 47 U.S.C. § 152 note (Section 601(d) of the Telecommunications Act of 1996, Pub. L. No. 104-104, Title VI, 110 Stat. 56, 114 (Feb. 8, 1996)) (wireless) and § 272(g)(3) (interexchange long distance). *And see AT&T Corp. v. FCC*, 220 F.3d 607, 632 (D.C. Cir. 2000).

[68] *See CPNI Order*. 123 FCC Rcd. at 8175 ¶¶ 160, 162 (imposing § 272 obligations with respect to BOC/Section 272 Affiliate sharing could potentially undermine customers privacy interests); ¶ 161 (imposing § 272 nondiscrimination obligations could result in BOCs choosing "not to disclose their local service CPNI [to] avoid [the] obligations"); *CPNI Reconsideration Order*, 14 FCC Rcd. ¶ 142; *AT&T/Bell Atlantic Complaint*, 15 FCC Rcd. 19997, 20005 ¶ (2000).

[69] Professor Tribe has advised the Commission that framing the choice this way would result in a violation of the constitution with respect to Section 272 as applied. *See* Letter from Kathryn

In addition to raising constitutional concerns, replacing "opt-in" regulations with additional CPNI burdens or restrictions on BOCs would be at odds with prior considered Commission determinations. The Commission has three times engaged in statutory interpretation analyses of the interplay between Sections 272 and 222. Each time, the Commission has determined that Section 222 controls the matter of CPNI sharing between a BOC and its Section 272 Affiliate. The Commission is not free to simply divorce itself from those prior interpretations,[70] particularly in light of its conclusion that the interpretation was invited and buttressed by the structure of the Telecommunications Act itself.[71]

The Commission also resolved the issue of statutory primacy as between Sections 222 and 272 on policy considerations, involving not only customer convenience and economic efficiency,[72] but market considerations, as well. The Commission has expressed its desire to allow for the creation of a comparable marketing environment for incumbent interexchange

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Marie Krause, Senior Attorney, U S WEST, Inc. to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, dated June 2, 1997, transmitting Letter from Laurence H. Tribe, to Mr. A. Richard Metzger, Deputy Bureau Chief, Federal Communications Commission *et al.*, dated June 2, 1997 ("Tribe June 2, 1997 Letter"), at 2, 4-5, 10-14 (unlawful condition); Letter from Kathryn Marie Krause, Senior Attorney, U S WEST, Inc. to Mr. William F. Caton, Acting Secretary, Federal Communications Commission, dated September 10, 1997, transmitting Letter from Laurence H. Tribe, to Mr. A. Richard Metzger, Deputy Bureau Chief, Federal Communications Commission *et al.*, dated June 10, 1997 at 1-2, 3, 6 (unlawful condition).

[70] *See, e.g.*, BellSouth at 8-9, Qwest at 25; SBC at 16-22; Verizon at 9-11.

[71] *See CPNI Reconsideration Order*, 14 FCC Rcd. ¶¶ 141-42.

[72] *See id.* ¶¶ 137, 142. "[T]he Commission's construction of section 222 as expressing pro-competitive concerns was only one of the several reasons why the Commission construed section 272(c)'s reference to 'information' not to include CPNI. The Commission also so concluded in order to 'further the principles of customer convenience and control,' and protect 'customer's privacy interests.' Moreover the Commission was concerned that a reading of section 272 such as that advocated by AT&T here [requiring nondiscriminatory treatment of CPNI] would lead BOCs to 'simply choose not to disclose their local service CPNI,' which 'would not serve the various customer interests envisioned under section 222." . . . Accordingly, because we conclude that section 272(c)'s reference to "information" does not include CPNI". *AT&T/Bell Atlantic Complaint*, 15 FCC Rcd. at 20004-05 ¶¶ 18-19. *See, e.g.*, BellSouth at 9-10; SBC at 17-22.

carriers and new-entrant BOCs, at the time a BOC began offering interexchange services.[73] Nothing about the Tenth Circuit's opinion requires a revisitation of this matter and the Commission should decline to undertake such action.

IV. CONCLUSION

For all of the reasons set forth above, the Commission should reject continued requests, over the objection of the overwhelming majority of commentors, that it infringe protected speech by mandating an opt-in requirement. The Commission should likewise deny requests that it reconsider its repeated holdings that Section 272 does not impose additional restrictions on the use of CPNI between a BOC and its Section 272 Affiliate not found in Section 222.

The Commission can avoid continued and unsettling controversy over the proper format and scope of CPNI approvals by deferring to the Congressional directive of Section 222. A CPNI approval model imposing directly on carriers the responsibility for compliance with Section 222, as disciplined by market forces, promotes the deregulatory emphasis of the Telecommunications Act. Yet, it allows for Commission enforcement actions in cases of carrier misfeasance to ensure compliance and protection of the public interest.

Should the Commission determine that reliance on market forces and regulatory enforcement capabilities is insufficient for proper administration of Section 222 and that more formal regulations are required, those regulations must conform to constitutional imperatives.

[73] *CPNI Order*, 13 FCC Rcd. at 8178 ¶ 167 and n.581. *See* Verizon at 11-12.

The only assured CPNI approval process to measure up to this standard is an opt-out one. Such approach fairly balances governmental, privacy and commercial interests in a manner consistent with the constitution and sound public policy.

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST SERVICES CORPORATION** to be 1) filed with the FCC via its Electronic Comment Filing System; and 2) served via email on the parties listed below.*

Richard Grozier
Richard Grozier

November 16, 2001

*Consistent with Section 1.47(d) of the FCC's rules, these parties have agreed to accept service via electronic mail. Alternatively, a hard copy of these Reply Comments can be obtained by telephoning Kelseau Powe at 202-429-3114.

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